IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

JULIA A. BURGIN **PLAINTIFF**

vs. **Civil Action No. 1:94cv95-D-D**

4 COUNTY ELECTRIC POWER ASSOCIATION and ALBERT JETHROW **DEFENDANTS**

MEMORANDUM OPINION

Presently before the court is the motion of the defendants for the entry of judgment as a matter of law on their behalf. Finding the motions well taken, the same shall be granted.

FACTUAL SUMMARY

The plaintiff Julia Burgin has brought this action charging the defendants with sexual harassment under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq. ("Title VII"). The plaintiff has also asserted against the defendants various state law claims. This case has a rather complicated background, and there are many facts in dispute between the parties as to events occurring throughout the history of this case. The concise facts, however, seen in the light most favorable to the plaintiff[1], are basically as follows:

The plaintiff was employed by the defendant 4 County Electric

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[1] In ruling on a motion for summary judgment, the court is not to make credibility determinations, weigh evidence, or draw from the facts legitimate inferences for the movant. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Rather, the evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor. Anderson, 477 U.S. at 255.

Power Association ("4 County") for a period of approximately nine (9) years, with her last position being that of an "Engineering Clerk." During her tenure with 4 County Ms. Burgin worked under the supervision of the defendant Albert Jethrow, the District Engineer. Ms. Burgin contends that Jethrow coerced her into a sexual relationship through various means, including a threat that he would inform her husband of a fictitious sexual relationship between she and Jethrow. Ms. Burgin conceded to these threats, and engaged in sexual relations with Jethrow over a period of months. Eventually, Ms. Burgin felt that she could no longer continue in this relationship and asked management officials for a transfer to another location. This request was refused, and after apprising her husband of what had transpired, Ms. Burgin quit her job at 4 County.

Ms. Burgin later filed this action against Jethrow and 4 County. The defendants have now moved for the entry of judgment as a matter of law on the plaintiff's claims.

DISCUSSION

I. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." F.R.C.P. 56(c). The party

seeking summary judgment carries the burden of demonstrating that there is an absence of evidence to support the non-moving party's case. Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S. Ct. 2548, 2553, 91 L.Ed.2d 265 (1986). After a proper motion for summary judgment is made, the non-movant must set forth specific facts showing that there is a genuine issue for trial. Hanks v. Transcontinental Gas Pipe Line Corp., 953 F.2d 996, 997 (5th Cir. 1992). If the non-movant sets forth specific facts in support of allegations essential to his claim, a genuine issue is presented. Celotex, 477 U.S. at 327, 106 S.Ct. at 2554. "Where the record, taken as a whole, could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L.Ed.2d 538 (1986); Federal Sav. and Loan Ins. v. Krajl, 968 F.2d 500, 503 (5th Cir. 1992). The facts are reviewed drawing all reasonable inferences in favor of the non-moving party. King v. Chide, 974 F.2d 653, 656 (5th Cir. 1992).

II. LIABILITY UNDER TITLE VII FOR SEX DISCRIMINATION

Title VII liability for sexual harassment attaches only for "employers" as defined under Title VII. An "employer" is defined as "a person engaged un an industry affecting commerce . . . and any agent of such a person." 42 U.S.C. § 2000e(b). While the parties do not dispute that 4 County is an employer for purposes of Title VII, the parties are in disagreement as to whether Albert

Jethrow meets this definition as an "agent." The Fifth Circuit has afforded a liberal interpretation to the word "agent" as used in this context. Garcia v. Elf Atochen North America, 28 F.3d 446, 451 (5th Cir. 1994); Harvey v. Blake, 913 F.2d 226, 227 (5th Cir. 1990). "[I]mmediate supervisors are Employers when delegated the employer's traditional rights, such as hiring and firing." Quijano v. University Credit Union, 617 F.2d 129, 131 (5th Cir. 1980). However, the actions of a mere co-worker cannot create liability under Title VII. Garcia, 28 F.3d at 451 (citing Harvey, 913 F.2d at 228). The Fifth Circuit has generally looked to three considerations to determine if a supervisor constitutes an "agent" of the employer:

1) the ability to hire/fire the plaintiff;
2) responsibility for the terms and conditions of the plaintiff's employment; and
3) responsibility for the plaintiff's work assignment.

Garcia, 28 F.3d at 451; Nash v. Electrospace System, Inc., 9 F.3d 401, 404 (5th Cir. 1993). The defendants have presented to this court substantial and undisputed evidence that Albert Jethrow did not have the ability to fire Ms. Burgin, nor was he generally responsible for the terms and conditions of her employment. The defendants have also submitted evidence that Jethrow was not responsible for the plaintiff's work assignments. The plaintiff does dispute this assertion, but the only evidence that she can produce in her favor on this point is a conclusory statement contained in her own affidavit that "Jethrow, as District Engineer,

supervised my day to day activities and had authority over crucial aspects of my work." Mere conclusory allegations are insufficient to defeat a properly made motion for summary judgment, for the plaintiff must come forward with specific facts to support her claim. Celotex, 477 U.S. at 327, 106 S.Ct. at 2554. In this case, the plaintiff has failed to demonstrate to this court specific facts to dispute the evidence submitted by the defendants in this matter. While Jethrow may have had general supervisory capacity over the plaintiff while on the job, his mere status as a member of supervisory personnel does not automatically make him an "agent" under Title VII. Garcia, 28 F.3d at 451. This court is unaware what "crucial aspects" of work the plaintiff is referring to, and such a generality cannot support a finding in the plaintiff's favor in this matter. Without more substantial evidence that Jethrow had been delegated traditional rights of the employer over Ms. Burgin, there is no genuine issue of material fact to be decided here.

Jethrow does not meet the definition of an "employer" under Title VII, and therefore the plaintiff cannot maintain this action against him. There is no genuine issue of material fact in this matter, and the defendants are entitled to the entry of judgment as a matter of law.

III. "HOSTILE WORK ENVIRONMENT" SEX DISCRIMINATION UNDER TITLE VII

The plaintiff asserts against 4 County a claim of "hostile work environment" sex discrimination under Title VII. In order to

establish her claim, the plaintiff must establish:

1) the employee belongs to a protected group;
2) the employee was subject to unwelcome sexual harassment;
3) the harassment complained of was based upon sex;
4) the harassment complained of affected a "term, condition or privilege of employment;" and
5) the employer knew or should have known of the harassment in question and failed to take prompt remedial action.

Nash, 9 F.3d at 403; Cortes v. Maxus Exploration Co., 977 F.2d 195, 199 (5th Cir. 1992); Jones v. Flagship International, 793 F.2d 714, 719-20 (5th Cir. 1986). For purposes of the motions at bar, the only issue that is in dispute regarding 4 County's liability for sexual harassment is whether 4 County "knew or should have known of the harassment and failed to take remedial action."

The plaintiff has admitted that she made no complaints to management concerning the actions of Jethrow. As well, the plaintiff stated in her deposition that she was not aware of anyone who witnessed any of the claimed harassment by Jethrow. There is no evidence before this court that 4 County had actual notice of any sexual harassment of Ms. Burgin. However, actual knowledge is not required, for an employer's knowledge of harassment can be either actual or constructive. Cuesta v. Texas Dept. of Criminal Justice, 805 F.Supp. 451, 458 (W.D. Tex. 1991); Valdez v. Church's Fried Chicken, Inc., 683 F.Supp. 596, 620 (W.D. Tex. 1988).

One way that constructive knowledge can be established is through demonstrating an agency relationship between the harassing party and the defendant. Cuesta, 805 F.Supp. at 458 (citing Vance

v. Southern Bell Telephone & Telegraph Co., 863 F.2d 1503, 1512 (11th Cir. 1989)); see also Nash, 9 F.3d at 404. This court has already determined that there is insufficient evidence to establish that Jethrow constitutes an agent for the purposes of Title VII, so this avenue for proving 4 County's knowledge is also precluded.

Lastly, constructive knowledge can be proven by showing that sexual harassment in the workplace was sufficiently pervasive so that knowledge can be imputed to the employer. Valdez, 683 F.Supp. at 620. The only support that the plaintiff offers which is relevant to this ground are other generalized and conclusory statements in her own affidavit that "4 County should have known of this harassment, because of the past actions of Jethrow with other female employees, most notably Pearlie Latham, who was harassed by Jethrow. 4 County had notice of this activity and took no action." Ms. Burgin fails to enlighten the court as to the nature of this harassment and how 4 County had or should have had notice of it. The fact that other harassment may have occurred does not necessarily mean that a reasonable trier of fact can conclude that the harassment was observed or became so pervasive that it should have been noticed. Again, the plaintiff fails to come forward with specific facts in the face of a properly supported motion for summary judgment.

Ms. Burgin has failed to present sufficient factual evidence that 4 County had knowledge of any sexual harassment which she

suffered at the hands of Albert Jethrow. There is no genuine issue of material fact in this matter, and the defendants are entitled to a judgment as a matter of law.

IV. PLAINTIFF'S STATE LAW CLAIMS

The plaintiff has also asserted various state law claims against the defendants. All of the plaintiff's claims which give rise to the jurisdiction of this court are being disposed of by virtue of a grant of summary judgment. The general rule in this circuit is "to dismiss state claims when the federal claims to which they are pendent are dismissed." Parker & Parsley Petroleum v. Dresser Industries, 972 F.2d 580, 585 (5th Cir. 1992) (citing Wong v. Stripling, 881 F.2d 200, 204 (5th Cir. 1989)). This court is aware of no reason why the general rule should not apply or why this court should use its discretion to continue exercising jurisdiction over the plaintiff's state law claims. Therefore, the remaining claims of the plaintiff will be dismissed without prejudice.

CONCLUSION

"When faced with a properly supported motion for summary judgment, a non-movant, such as plaintiff, cannot merely 'sit back and wait for trial.'" Hinton v. Teamsters Local Union No. 891, 818 F.Supp. 939 (N.D. Miss. 1993) (quoting Page v. De Laune, 837 F.2d 233, 238 (5th Cir. 1988)). Ms. Burgin has failed to present this court with specific facts in support of required elements of her

claims arising under federal law. The defendants' motions for the entry of judgment as a matter of law shall be granted.

A separate order in accordance with this opinion shall issue this day.

THIS _____ day of May, 1995.

United States District Judge

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ORDER GRANTING MOTIONS FOR THE ENTRY OF JUDGMENT AS A MATTER OF LAW

Pursuant to a memorandum opinion issued this day, it is hereby ORDERED THAT:

1) the defendants' motions for the entry of judgment as a matter of law are hereby GRANTED.

2) the plaintiff's claims arising under Title VII of the Civil Rights Act of 1964 are hereby DISMISSED with prejudice.

3) in that this court declines to exercise jurisdiction over the plaintiff's state law claims in this cause, those state law claims are hereby DISMISSED without prejudice.

SO ORDERED, this the _____ day of May, 1995.

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United States District Judge